

**Before the  
Federal Communications Commission  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Petition for Reconsideration of Various Auction 87 Public Notices	)	AU Docket No. 09-205
	)	
Petition to Deny Long-Form License Application of Silke Communications, Inc. (Auction 87)	)	File No. 0004355886
	)	
Petition to Deny Long-Form License Application of Two Way Communications (Auction 87)	)	File No. 0004359102
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 27, 2012**

**Released: April 27, 2012**

By the Chiefs, Mobility Division and Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

1. In this Memorandum Opinion and Order, we address three petitions jointly filed by Warren Havens and six entities under his control (collectively, “Havens Parties”) based on a claim that an auction applicant should not be permitted to amend its application to seek a lower bidding credit than it had requested in its initial filing and that any such amendment should automatically disqualify the applicant from further participation in the auction. One petition seeks reconsideration of every one of the public notices issued regarding the Commission’s most recent auction of upper and lower band paging licenses (Auction 87).<sup>1</sup> The other two petitions request that the Commission deny the post-auction paging license applications of two winning bidders on the grounds that each bidder amended its auction application to, among other things, request a lower bidding credit.<sup>2</sup> For the reasons stated below, we dismiss the petition for reconsideration of the Auction 87 public notices and the petitions to deny the license applications. As an alternative and independent basis for rejecting the petitions to deny, we find that the Havens Parties’ claims fail on the merits.

<sup>1</sup> See Petition for Reconsideration of Various Auction 87 Public Notices, AU Docket No. 09-205, filed by Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, V2G LLC, Telesaurus Holdings GB LLC, Verde Systems LLC, Environmental LLC, and Warren Havens (filed Sep. 27, 2010, amended Oct. 19, 2010) (Petition for Reconsideration).

<sup>2</sup> Petition to Deny the Auction 87 Application of Silke Communications, Inc. (Silke), filed by Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, V2G LLC, Telesaurus Holdings GB LLC, Verde Systems LLC, Environmental LLC, and Warren Havens (filed Sep. 27, 2010, amended Oct. 20, 2010) (Silke Application Petition); Petition to Deny the Auction 87 Application of Two Way Communications (Two Way), filed by Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, V2G LLC, Telesaurus Holdings GB LLC, Verde Systems LLC, Environmental LLC, and Warren Havens (filed Sep. 27, 2010, amended Oct. 20, 2010) (Two Way Application Petition).

## I. BACKGROUND

2. *Auction Process and Procedures.* Some background on the Commission's auction process and procedures may be helpful in understanding the Havens Parties' claims. To participate in a Commission auction, a potential bidder must submit a "short-form application" (FCC Form 175) in which it certifies that it meets the applicable legal, technical and financial qualifications for the licenses offered at auction, including, if it claims eligibility for a small business bidding credit, that it satisfies the eligibility standards.<sup>3</sup> For Auction 87, entities with average gross revenues not exceeding \$3 million for the preceding three years could seek a 35 percent bidding credit, and those with average gross revenues not exceeding \$15 million could request a 25 percent credit.<sup>4</sup>

3. Prior to the auction, the Commission staff reviews the submitted short-form applications and notifies each applicant that its application is either complete or, if deficiencies exist, incomplete.<sup>5</sup> The Commission's competitive bidding rules provide that an applicant with an incomplete application will have a limited opportunity to cure those deficiencies and resubmit a corrected short-form application.<sup>6</sup> The Commission staff reviews all of the short-form applications, including the resubmitted ones, to determine which entities qualify to bid in the auction.

4. The staff's review is guided in part by a distinction in the rules between "major amendments" and "minor amendments." Major amendments are defined as "changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application."<sup>7</sup> Major amendments "cannot be made to a short-form application after the initial filing deadline," and if an applicant submits a major amendment, the application will be deemed newly filed and it "may not be resubmitted after applicable filing deadlines."<sup>8</sup> The rule defines a minor amendment as essentially any amendment "not identified as major."<sup>9</sup>

5. *Auction 87.* On November 30, 2009, the Wireless Telecommunications Bureau (Bureau) announced an auction of 9,603 upper and lower paging band licenses (Auction 87).<sup>10</sup> Silke Communications, Inc. (Silke) and Two Way Communications (Two Way) each submitted the required

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<sup>3</sup> A bidding credit represents an amount by which a bidder's winning bid will be discounted. See 47 C.F.R. § 1.2110; see also Auction of Lower and Upper Paging Bands Licenses Scheduled for May 25, 2010; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 87, *Public Notice*, 25 FCC Rcd 6333, 6350 ¶ 72 (WTB 2010) (*Procedures Public Notice*).

<sup>4</sup> 47 C.F.R. §§ 1.2110(f)(2), 22.217, 22.223.

<sup>5</sup> If an application is deemed complete, the applicant need only provide an upfront payment to qualify; if the application is deemed incomplete, the applicant must address the deficiencies identified by the Commission staff in an amended application.

<sup>6</sup> See 47 C.F.R. § 1.2105(b)(2) ("[t]he Commission will provide bidders a limited opportunity to cure defects [in their short-forms]. . .").

<sup>7</sup> 47 C.F.R. § 1.2105(b)(2).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Auction of Lower and Upper Paging Bands Licenses Scheduled for May 25, 2010; Comment Sought on Competitive Bidding Procedures for Auction 87, *Public Notice*, 25 FCC Rcd 6156 (WTB 2009) (*Comment Public Notice*). Auction 87 subsequently was re-scheduled to begin on June 15, 2010. See Auction of Lower and Upper Paging Bands Licenses Rescheduled for June 15, 2010; Status of Short-Form Applications To Participate in Auction 87, *Public Notice*, 25 FCC Rcd 3522 (WTB 2010) (*Status Public Notice*).

short-form application to participate in Auction 87.<sup>11</sup> Both claimed a bidding credit in their initial short-form applications, with Silke claiming a bidding credit of 35 percent and Two Way a bidding credit of 25 percent.

6. On April 13, 2010, the Bureau released a public notice announcing the status of the Auction 87 short-form applications.<sup>12</sup> Both Silke's and Two Way's applications were deemed incomplete, requiring additional information to support their claimed bidding credits.<sup>13</sup> Both applicants amended their short-form applications by the resubmission deadline with additional disclosures to address the deficiencies in their initial filings. Based on these additional disclosures, Silke changed its bidding credit request from 35 percent to 25 percent, and Two Way withdrew its request for a bidding credit altogether.<sup>14</sup>

7. On May 27, 2010, the Bureau released a public notice listing the Auction 87 applicants that qualified to participate in the auction.<sup>15</sup> Silke and Two Way both qualified as bidders in Auction 87, with Silke qualifying with a 25 percent bidding credit, and Two Way qualifying with no bidding credit.<sup>16</sup>

8. *Havens Petition for Judicial Review and Emergency Stay.* On June 8, 2010, Warren Havens, and the three entities under his control that qualified to participate in Auction 87, filed a petition for review and emergency motion to stay with the U.S. Court of Appeals for the Ninth Circuit.<sup>17</sup> Havens asserted that Silke's and Two Way's request for a lower bidding credit should have been treated as major amendments, their applications should have been dismissed, and Auction 87 should not take place with Silke and Two Way as participants.<sup>18</sup> The Commission opposed Havens' petition, noting that the court

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<sup>11</sup> See Silke Communications, Inc., File No. 0001551480 (submitted March 16, 2010, as amended Apr. 27, 2010) (Silke Application); Two Way Communications, File No. 0004169234 (submitted March 15, 2010, as amended Apr. 27, 2010) (Two Way Application). See Applications Are Due March 16, 2010, for the Upcoming Auction of Lower and Upper Paging Bands Licenses (Auction 87), *Public Notice*, 25 FCC Rcd 2310 (WTB 2010) (*Short Form Reminder Public Notice*).

<sup>12</sup> *Status Public Notice*, 25 FCC Rcd 3522.

<sup>13</sup> *Id.* at 3524-5 ¶¶ 9, 14.

<sup>14</sup> See Silke Application, Exhibit – Letter from Robert H. Schwaninger, Jr., Counsel for Silke Communications, to FCC Auctions Division (dated Apr. 26, 2010) (Silke Amendment) (requesting leave to lower bidding credit eligibility from 35 percent to 25 percent on account of applicant Silke's misunderstanding of "affiliate" definition and related gross revenue attribution requirement); Two Way Application, Exhibit – Letter from Frank W. Ruth, Two Way Communications (undated) (Two Way Amendment) (notifying Commission that it no longer seeks a bidding credit).

<sup>15</sup> See Auction of Lower and Upper Paging Bands Licenses; 69 Bidders Qualified to Participate in Auction 87, *Public Notice*, 25 FCC Rcd 5407 (WTB 2010) (*Qualified Bidder Public Notice*).

<sup>16</sup> See *Qualified Bidder Public Notice*, 25 FCC Rcd at 5407 n.2.

<sup>17</sup> See Petition for Review, filed by Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless, V2G LLC, and Warren Havens, on Jun. 8, 2010, *Skybridge Spectrum Foundation, et al. v. United States of America and the Federal Communications Commission* (9<sup>th</sup> Cir. 2010) (No. 10-71808) (*Skybridge Spectrum*). The Havens Parties request that all *Skybridge Spectrum* pleadings be "incorporated by reference" into the three petitions addressed here. See, e.g., Silke Application Petition at 11; Petition for Reconsideration at 4.

<sup>18</sup> See Emergency Motion Under Circuit Rule 27-3 for Stay of Agency Action Under FRAP 18, or, in the Alternative, Petition for Writ of Mandamus, at ii, filed by Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless LLC, V2G LLC, and Warren Havens on Jun. 8, 2010, in *Skybridge Spectrum*. Havens sought in the alternative that the court issue a writ of mandamus, directing the Commission to vacate the *Qualified Bidder Public Notice*, which announced Silke and Two Way as qualified bidders in Auction 87, and stay Auction 87 until further order by the U.S. Court of Appeals for the Ninth Circuit. *Id.* at iii, 25-27.

lacked jurisdiction because the petitioners had not filed an application for review with the Commission prior to seeking judicial review.<sup>19</sup> The Ninth Circuit court declined to issue an injunction stopping the auction and subsequently dismissed the matter for lack of standing.<sup>20</sup>

9. *Auction 87 Bidding and Auction Results.* Auction 87 began on June 15, 2010, and closed on August 6, 2010.<sup>21</sup> During the auction, none of the three Havens Parties that participated in Auction 87 bid on any of the licenses upon which Silke and Two Way bid.<sup>22</sup> Silke and Two Way were among the 59 high-bidders that won spectrum in the auction.<sup>23</sup> After the auction, Silke and Two Way submitted the required license application (FCC Form 601), also known as a “long-form” application.<sup>24</sup>

10. *Havens Parties’ Petition for Reconsideration.* On September 27, 2010, all seven Havens Parties, including the four that did not participate in Auction 87, sought reconsideration of all Auction 87 public notices,<sup>25</sup> specifically citing their opposition to the policy of allowing an auction applicant to request a lower bidding credit than requested in its initial short-form application.<sup>26</sup> The Havens Parties present a number of different arguments for their disagreement with this policy. For example, they claim that allowing an auction applicant to amend its bidding credit request to seek a lesser bidding credit may encourage applicants to not disclose accurate information concerning their bidding credit requests until after they are awarded the licenses.<sup>27</sup> The Havens Parties also claim that this policy concerning the processing of applications is inconsistent with the terms of section 1.2105(b)(2), which states that “any

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<sup>19</sup> Opposition of the Federal Communications Commission to Petitioners’ Motion for a Stay, filed on June 11, 2010, in *Skybridge Spectrum Foundation*.

<sup>20</sup> See Order dated September 13, 2010 in *Skybridge Spectrum Foundation*. The Ninth Circuit court also denied a motion for reconsideration, finding that it lacked jurisdiction because the petitioners had not filed an application for review with the Commission prior to seeking judicial review. See Order dated December 1, 2010 in *Skybridge Spectrum Foundation*.

<sup>21</sup> See Auction of Lower and Upper Paging Bands Licenses Closes; Winning Bidders Announced for Auction 87, *Public Notice*, 25 FCC Rcd 18164 (WTB 2010) (*Closing Public Notice*).

<sup>22</sup> The three Havens Parties that participated in Auction 87 – Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, and V2G LLC – were qualified to bid on all the licenses offered in Auction 87, and therefore, had the opportunity to bid on the same licenses that Silke and Two Way bid upon.

<sup>23</sup> Silke won 16 licenses and Two Way won 21 licenses in Auction 87.

<sup>24</sup> See Silke Application, File No. 0004355886 (filed Aug. 24, 2010, amended Sep. 10 and Sep. 14, 2010); Two Way Application, File No. 0001718543 (filed Aug. 19, 2010, amended Sep. 9, 2010).

<sup>25</sup> See Petition for Reconsideration at 3. The Havens Parties sought leave to submit an amended Petition for Reconsideration that exceeded the 25-page limit specified in 47 C.F.R. § 1.106(f). Request to Accept Under Section 1.48(b) Amended Petition for Reconsideration that Exceeds Page Limit of Section 1.106 of the Havens Parties (filed Oct. 12, 2010). The Bureau’s Mobility Division granted that request, and extended the date by which the amended petition had to be submitted by an additional day (*i.e.*, to October 19, 2010). See Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, to Warren Havens (dated Oct. 15, 2010). The Division letter explained that it was limited to addressing the Havens Parties’ request for waiver of section 1.106(f) and did not address the issues raised in the initial September 27, 2010 filing. *Id.* at n.1.

<sup>26</sup> Petition for Reconsideration at 3. The Havens Parties state that they “do not seek . . . a revocation of Auction 87 including the results of the auction” in which certain Havens Parties won licenses. *Id.* at 4. The Havens Parties claim they seek to eliminate the policy in question for all auctions, both past and future. *Id.*

<sup>27</sup> Petition for Reconsideration at 6.

change in an applicant's size which would affect an applicant's eligibility for designated entity provisions" is a major amendment.<sup>28</sup>

11. *Havens Parties' Petitions to Deny.* The Havens Parties also pursue their arguments in petitions to deny filed against Silke's and Two Way's long-form applications.<sup>29</sup> The petition to deny against the Two Way application contains little more than a bare conclusion that Two Way's long-form application involved a "major, disqualifying change in bidder size" without any supporting discussion of facts or analysis.<sup>30</sup> Instead, the Havens Parties claim that this filing "references and incorporates in full the text and exhibits" in the separate petition to deny against Silke's application.<sup>31</sup>

12. Similarly, the petition to deny against the Silke application contains no individualized substantive claims based on Silke's particular qualifications.<sup>32</sup> That petition consists primarily of references to separately-filed requests, pleadings and e-mails with little, if any, explanation of how such documents may relate to any claims challenging Silke's application. The petition to deny against the Silke application seeks to incorporate by reference the text of the Havens Parties' separately-filed petition for reconsideration. This petition to deny, along with its appendix and numerous exhibits, exceeds 250 pages in length.<sup>33</sup> The petition requests that, in the event that the Havens Parties are found to lack standing to file a petition to deny, the claims in the petition should be considered informally pursuant to section 1.41 of the Commission's rules.<sup>34</sup> The petition also contains arguments concerning the Havens Parties' standing and an assertion that Silke's long-form application is defective on the grounds that it lacks information concerning certain agreements.<sup>35</sup> The petition includes a discussion of Havens's challenge to the rule requiring a higher upfront payment for an entity that has previously been delinquent

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<sup>28</sup> 47 C.F.R. § 1.2105(b)(2). See Petition for Reconsideration at Exhibit 4; see also Silke Application Petition at 10. The Havens Parties allege that the issue they raise here is the subject of another administrative proceeding initiated by Havens, seeking reversal of the grant of a long-form application in 2006 following Auction 61. Petition for Reconsideration at 4-5. See Wireless Telecommunications Bureau Grants Ten Automated Maritime Telecommunications Systems Licenses, Report No. AUC-61-H, *Public Notice*, 21 FCC Rcd 15,061 (WTB 2006).

<sup>29</sup> See, generally, Silke Application Petition and Two Way Petition. On October 19, 2010, the Havens Parties submitted an amended Petition for Reconsideration in which they seek to incorporate by reference a set of exhibits filed with the Havens Parties' separately-filed petitions to deny as well as the texts of the petitions to deny themselves. Supplement and Amendment to Petition for Reconsideration (Errata Copy), AU Docket No. 09-205, filed on October 19, 2010, by Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, V2G LLC, Telesaurus Holdings GB LLC, Verde Systems LLC, Environmental LLC, and Warren Havens.

<sup>30</sup> Two Way Application Petition at 1-2.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> The Havens Parties do make a claim of a procedural nature against Silke's long-form application – namely, that Silke failed to provide a summary or description of any agreements that demonstrate its designated entity status, per requirements of 47 C.F.R. §§ 1.2110(j) and 1.2112(b)(1)(iii). Silke Application Petition at 7-8. Presumably this claim would not carry over to the Havens Parties' petition to deny Two Way's long-form application, since Two Way was not seeking a bidding credit. The Havens Parties also claim that Silke and Two Way effectively committed perjury when they made their initial filing. *Id.* at 8. The Havens Parties claim that, therefore, the parties "lacked candor, and thus licensee character and fitness, for not directly admitting its timely filed short form defects." *Id.* All of these claims, however, stem from the claim that Silke and Two Way made major modifications to their short-form applications.

<sup>33</sup> *Id.* at 2-3.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 4-8.

or has defaulted on non-tax debt, though it does not explain the relationship of that complaint to Silke's application.<sup>36</sup> The Havens Parties' petition concludes with an argument that Silke should not have been permitted to amend its bidding credit claim, and that Silke's application must be dismissed.<sup>37</sup> The petition seeks to incorporate by reference the pleadings filed in the (now-dismissed) Ninth Circuit case.

13. In their oppositions to the Havens Parties' petitions to deny, Silke and Two Way contend that they followed Commission policy and promptly sought to report the necessary changes concerning their bidding credit eligibility.<sup>38</sup> They assert that the Havens Parties filed the petitions to deny, along with the petition for reconsideration, in an effort to attack rulings adverse to the Havens Parties on similar issues in separate proceedings to which neither Silke nor Two Way were parties.<sup>39</sup> They observe that the Havens Parties have failed to show evidence of actual harm as a result of the implementation of this policy in Auction 87, and that the Havens Parties have presented no evidence that granting licenses to Silke and Two Way would not serve the public interest.<sup>40</sup>

## II. DISCUSSION

14. We dismiss the Havens Parties' petitions for reconsideration as procedurally improper. We also dismiss the Havens Parties' petitions to deny the license applications for lack of standing to challenge the application of our policy concerning minor amendments to Two Way and Silke and failure to comply with the section 1.939 procedural requirements. As alternative and independent bases for rejecting the petitions to deny, we find no merit in the Havens Parties' claim that Two Way and Silke undertook a major change and that those parties should have been disqualified from participation in the auction on that basis. Accordingly, we will proceed with processing of the long-form applications of Two Way and Silke.

### A. Havens Parties' Pleadings Fail to Meet Procedural Prerequisites

#### 1. Dismissal of Petition for Reconsideration of Auction 87 Public Notices

15. The Havens Parties seek reconsideration of all of the public notices issued concerning Auction 87, claiming that these public notices should be considered actions subject to Section 405 of the Communications Act of the 1934, as amended ("Act").<sup>41</sup> Section 405 of the Act establishes the statutory mechanism for a party to seek reconsideration of any Commission "order, decision, report, or action," and section 1.106 of the Commission's rules implements the statute.<sup>42</sup> Section 405 of the Act and section 1.106 of the Commission's rules apply to final actions. As section 1.106 indicates, petitions for reconsideration of other interlocutory actions will not be entertained.<sup>43</sup> In this case, most of the public notices issued in conjunction with a Commission auction do not establish or deny rights, but simply

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<sup>36</sup> *Id.* at 8-10.

<sup>37</sup> *Id.* at 10-11.

<sup>38</sup> See Objection to Petition for Reconsideration and Petition to Deny, filed by Silke Communications (filed Oct. 1, 2011) (Silke Opposition); Opposition to Petition to Deny, filed by Two Way Communications (filed Oct. 1, 2011) (Two Way Opposition).

<sup>39</sup> Silke Opposition at 1-2; Two Way Opposition at 1.

<sup>40</sup> Silke Opposition at 1-2; Two Way Opposition at 1.

<sup>41</sup> Petition for Reconsideration at 7. 47 U.S.C. § 405.

<sup>42</sup> 47 U.S.C. § 405; 47 C.F.R. § 1.106.

<sup>43</sup> 47 C.F.R. § 1.106(a)(1).

provide information about the auction, and therefore are interlocutory in nature and not subject to reconsideration.<sup>44</sup>

16. To the degree that certain Auction 87 public notices do establish or deny rights, and therefore, might be considered final actions subject to reconsideration, Section 405 of the Act and section 1.106 of the Commission's rules are not without limit: a petition for reconsideration must be brought within 30 days of notice of the action.<sup>45</sup> The release date of the auction public notices would serve as the date of notice, and in the case of every Auction 87 public notice, except for the *Accepted for Filing Public Notice*,<sup>46</sup> the Havens Parties' Petition for Reconsideration is well beyond the 30-day window to seek reconsideration.<sup>47</sup> Therefore, to the degree that certain Auction 87 public notices are not considered interlocutory and therefore are subject to reconsideration, we dismiss the Havens Parties' Petition for Reconsideration with regards to those public notices as untimely.

17. As for the *Accepted for Filing Public Notice*, although the Havens Parties filed for reconsideration within the 30-day statutory deadline, we find that public notice did not grant, establish, or deny any rights. Rather, the public notice provides a notice of the long-form applications that have been accepted for filing and establishes the procedures and deadlines for filing petitions to deny against the accepted long-form applications.<sup>48</sup> The public notice therefore is interlocutory and, pursuant to section 1.106, may not be the subject of a petition for reconsideration. The proper vehicle through which to challenge an interlocutory order would be to raise any pertinent argument in a petition to deny a long form application, not a petition for reconsideration of the *Accepted for Filing Public Notice*.<sup>49</sup> Because,

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<sup>44</sup> It is improper for a party to file a petition for reconsideration of a Commission public notice that does not establish or deny rights. See Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, to Walter Steimel, Jr., Counsel for Red Hot Radio, G.P., Letter, 17 FCC Rcd 3691, 3695 (WTB 2002) (dismissing petition for reconsideration as untimely because the public notice "was not an order or action of the Commission (or of the Wireless Telecommunications Bureau) canceling [petitioner's] licenses," but "was issued to announce the date by which Eligible Licensees were required to choose a restructuring option."), *app. for review denied*, Red Hot Radio, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 6737, 6743 ¶ 14 (2004) (upholding Bureau's dismissal of petition for reconsideration). For purposes of this decision, we need not decide whether the auction public notices are "decisions" or "actions" subject to reconsideration. Several of the public notices only provide information about the auction or seek comment on auction procedures. For example, the *Auction 87 Comment Public Notice* simply sought comment on procedures for conducting Auction 87. Likewise, the *Auction 87 Closing Public Notice* announced the winning bidders in Auction 87 and set forth post-auction long-form application and payment instructions.

<sup>45</sup> 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

<sup>46</sup> See Wireless Telecommunications Bureau Announces that Applications for Lower and Upper Paging Bands Licenses Are Accepted for Filing, *Public Notice*, 25 FCC Rcd 13229 (WTB 2010) (*Accepted for Filing Public Notice*).

<sup>47</sup> See 47 C.F.R. § 1.4(b)(2). The Bureau released the *Comment Public Notice* on November 20, 2009, and its erratum on December 11, 2009; the *Procedures Public Notice* on January 22, 2010; the *Short Form Reminder Public Notice* on March 10, 2010; the *Status Public Notice* on April 13, 2010; the *Qualified Bidder Public Notice* on May 27, 2010; and the *Closing Public Notice* on August 12, 2010. The Havens Parties submitted their Petition for Reconsideration on September 27, 2010.

<sup>48</sup> See *Accepted for Filing Public Notice*, 25 FCC Rcd at 13229 (setting forth instructions and deadlines for petitions to deny); see also 47 C.F.R. § 1.2108(b) (petitions to deny may be filed within period established by public notice).

<sup>49</sup> See Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Dave Garey, Jet Fuel Broadcasting, and Harry C. Martin, Fletcher, Heald & Hildreth, PLC, Letter, 24 FCC Rcd 13668, 13670 (MB 2009) (noting that if, and when, applicant's long form application has been placed on public notice as accepted for filing, petitioner will have an opportunity to raise the objections contained in its dismissed petition for reconsideration by filing a timely petition to deny the application).

as discussed below, we are dismissing the Havens Parties' petitions to deny the Silke and Two Way long-form applications, this petition for reconsideration of the *Accepted for Filing Public Notice* provides no occasion to address the substantive issues raised in the petition.<sup>50</sup>

## 2. Failure to Satisfy Pleadings Requirements

18. The petitions to deny fail to satisfy the procedural requirements of section 1.939 of the Commission's rules and we dismiss them on that basis.<sup>51</sup> A petition to deny an application must set forth specific allegations of fact sufficient to make a *prima facie* showing that petitioner is a party in interest, and that grant of the application would be inconsistent with the public interest, convenience, and necessity.<sup>52</sup> It is important for the orderly processing of applications and petitions that parties adhere to the Commission's pleading practices outlined in the Commission's rules.<sup>53</sup> The petition to deny Two Way's long-form application does not set forth any specific allegations of fact, nor does it make any arguments *per se*. Instead, it simply incorporates by reference the text and exhibits from the Havens Parties' petition to deny Silke's long-form application without setting forth any facts pertaining to Two Way's application or any explanation of how the contents of the Silke petition apply to Two Way's application.<sup>54</sup>

19. Similarly, the petition to deny Silke's long-form application consists largely of statements that the facts and arguments contained in other filings, including the petition for reconsideration, should be incorporated by reference.<sup>55</sup> As with the Two Way Application Petition, the Silke Application Petition contains little explanation of how the arguments from the incorporated filings relate to Silke's application. The Silke Application Petition makes numerous references to other filings by the Havens Parties without explanation as to how such documents' contents might be relevant to the Havens Parties' challenge to Silke's long-form application.<sup>56</sup> Similarly, the Silke Application Petition fails to explain how Mr. Havens's complaint concerning the rule requiring a higher upfront payment for an entity that has previously been delinquent or has defaulted on non-tax debt has any bearing on this matter.<sup>57</sup>

20. In the absence of any explanation of how those separate filings might apply to the challenge at hand, it is very difficult for the reader to understand the Havens Parties' arguments in support of their petition to deny Silke's application. As a result, the Commission and opposing parties have the burdensome task of navigating through a complicated trail of potentially irrelevant filings in order to

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<sup>50</sup> Notwithstanding this conclusion, to the extent that the petition for reconsideration raises substantive arguments challenging the application of our policy concerning minor amendments to Two Way and Silke, we note that this order addresses those claims in its denial of the merits of the petitions to deny below. See section II.B., below.

<sup>51</sup> 47 C.F.R. § 1.939.

<sup>52</sup> See 47 C.F.R. § 1.939(d); see also 47 U.S.C. § 309(d)(1).

<sup>53</sup> See *United States Cellular Corp. Constructed Tower Near Fries, Virginia, et al., Order*, 24 FCC Rcd 8729, 8734 ¶ 15 (2009).

<sup>54</sup> See Two Way Application Petition at 2. Specifically, the Havens Parties state: "This Two Way PD references and incorporates in full the text and exhibits of the petition to deny filed by Petitioners today of the Silke Communications' long form in Auction 87 (i) exclusive of matters therein specific to Silke's amended short form's details (but not excluding its change of bid discount level), and (ii) substituting Two Way bidding shown in Exhibit 10 for Silke bidding (arguments thereupon are same)." *Id.*

<sup>55</sup> See Silke Application Petition.

<sup>56</sup> See para. 12 *supra*.

<sup>57</sup> We note that Havens has raised that issue in a separate filing, and the Bureau intends to address that matter separately.

decipher the Havens Parties' arguments at the risk of attributing arguments to the Havens Parties that they did not actually make. It is the Havens Parties' burden to set forth specific allegations of facts in support of their petitions to deny and they have failed to meet this burden.<sup>58</sup> Accordingly, we find the Silke Application Petition and Two Way Application Petition fail to meet the fundamental pleading requirement of section 1.939 of the Commission's rules.<sup>59</sup>

### 3. Havens Parties Lack Standing

21. For the reasons described below, we also dismiss the Havens Parties' petitions to deny the long-form applications of Silke and Two Way because the Havens Parties have failed to establish standing. To establish party-in-interest standing, a petitioner must allege facts sufficient to demonstrate that grant of the subject application would cause it to suffer a direct injury.<sup>60</sup> In addition, petitioners must demonstrate a causal link between the claimed injury and the challenged action.<sup>61</sup> To demonstrate a causal link, petitioners must establish that the injuries can be traced to the challenged action and the injury would be prevented or redressed by the relief requested.<sup>62</sup>

22. In addition to those general requirements for establishing standing, the Commission and the Court of Appeals for the District of Columbia Circuit have discussed standing requirements specifically in the context of the Commission's spectrum auctions.<sup>63</sup> The Court of Appeals has acknowledged that a bidder has a right to a legally valid auction process, yet it has maintained that "a disappointed bidder, to have standing to challenge the auction outcome, must demonstrate 'that it was able and ready to bid and that the decision of the Commission prevented it from doing so on an equal basis.'"<sup>64</sup> Accordingly, an entity that was not qualified to bid in particular markets in an auction has no standing to file a petition to deny the winning bidders' applications in those markets.<sup>65</sup> Moreover, to establish party in interest standing, a qualified bidder must have actually participated in competitive bidding for licenses in those markets.<sup>66</sup>

23. The Havens Parties claim that they have standing because they are parties-in-interest with respect to the Silke and Two Way long-form applications.<sup>67</sup> The Havens Parties base their claim of

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<sup>58</sup> See 47 C.F.R. § 1.939(d).

<sup>59</sup> *Id.*

<sup>60</sup> *Wireless Co., L.P., Order*, 10 FCC Rcd 13233, 13235 ¶ 7 (WTB 1995) (*Wireless Co.*), citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

<sup>61</sup> *Wireless Co.*, 10 FCC Rcd at 13235 ¶ 7.

<sup>62</sup> *Id.*

<sup>63</sup> See *High Plains Wireless v. FCC*, 273 F.3d 599, 605 (D.C. Cir. 2002) (ruling that an entity that was not qualified to bid in a particular market in an auction does not have standing to file a petition to deny a winning bidder's application in that market); *Alaska Native Wireless, L.L.C., Order*, 18 FCC Rcd 11640, 11644-45 ¶¶ 10-11 (2003).

<sup>64</sup> See *High Plains*, 273 F.3d at 605; *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829-30 (D.C. Cir. 1997) (*DIRECTV*), citing *Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

<sup>65</sup> See *High Plains*, 276 F.3d at 605 (finding that an auction participant that did not bid on some of the licenses it was petitioning did not have standing to challenge the award of licenses on which it did not bid and that were won by another entity). Additionally, a disappointed bidder must prove that its injury is redressable by demonstrating that it is "ready, willing, and able" to participate in a new auction should it prevail. *Id.*

<sup>66</sup> See *Alaska Native Wireless, L.L.C., Order*, 17 FCC Rcd 4231, 4235 ¶ 9 (WTB 2002) (*Alaska Native Bureau Order*), *app. for review denied*, *Order*, 18 FCC Rcd 11640 (2003).

<sup>67</sup> See Silke Application Petition at 4-7; Petition for Reconsideration at 3-5.

standing first on an assertion that the Commission is “judicially estopped from taking the position that [they] do not have standing” because, when challenging Havens’s stay request in the Ninth Circuit, the Commission noted that the Havens Parties could challenge the policy in question after the auction had concluded.<sup>68</sup> The Commission’s observation in the Ninth Circuit proceeding, however, does not automatically confer standing to the Havens Parties, but only points out that the Havens Parties would have *an opportunity* to challenge the policy in question after the competitive bidding in Auction 87 ends.<sup>69</sup> Standing to challenge the long-form application of a winning bidder in an auction is necessarily based on the existence of facts that can only be determined to be sufficient *after* the auction.<sup>70</sup>

24. The Havens Parties claim that they have standing “since they participated in Auction 87” and were subject to the policy of allowing bidders to request a lower bidding credit.<sup>71</sup> They also claim that each of the Havens Parties was qualified to bid on all of the licenses on which Silke and Two Way were qualified to bid.<sup>72</sup> However, four of the seven Havens Parties – Telesaurus Holdings GB LLC, Verde Systems LLC, Environmental LLC, and Warren Havens as an individual – did not submit short-form applications and therefore did not participate at all in Auction 87. Thus, the Havens Parties’ claims to have participated in the auction are at least inaccurate in part and those four parties clearly lack standing to challenge Auction 87 procedures and applications of winning bidders.<sup>73</sup>

25. With regard to the three Havens Parties that did participate in Auction 87, these entities fail to demonstrate how awarding licenses to Silke and Two Way would somehow deprive them of a valid auction process with respect to the markets for which those three entities did bid.<sup>74</sup> Nor can they. None of the three Havens Parties that qualified to participate in Auction 87 ever placed bids on any licenses upon which Silke and Two Way bid.<sup>75</sup> The Havens Parties instead contend that Silke’s (and presumably Two Way’s) participation in the competitive bidding “increased competition in the auction” because some bidders that competed against Silke (and, again presumably, Two Way) had also placed bids on licenses on which certain Havens Parties also bid.<sup>76</sup> The Havens Parties therefore, claim that, if Silke (or Two Way) had been disqualified, a third party that was outbid on a license by Silke (or Two Way) might not have bid against the Havens Parties.<sup>77</sup>

26. Such general speculation, however, is insufficient to confer standing. The Havens Parties do not assert that they were able and ready to bid and that the decision of the Commission prevented them from doing so on an equal basis. Instead, they claim that the policy in question “affected the auction and in particular [their] bidding strategy and financing arrangements” without any concrete allegation of

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<sup>68</sup> Petition for Reconsideration at 5.

<sup>69</sup> See *Skybridge Spectrum Foundation* Opposition of the FCC to Petitioners’ Motion for a Stay at 11.

<sup>70</sup> See 47 U.S.C. §309(d); 47 C.F.R. §1.2108(b).

<sup>71</sup> Petition for Reconsideration at 5.

<sup>72</sup> Silke Application Petition at 5.

<sup>73</sup> Specifically, Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, and V2G LLC participated in Auction 87. Telesaurus Holdings GB LLC, Verde Systems LLC, Environmental LLC, and Warren Havens did not file a short-form application or otherwise participate directly in the auction.

<sup>74</sup> See *Alaska Native Bureau Order*, 17 FCC Rcd at 4235 ¶9.

<sup>75</sup> For bidding information in Auction 87, see the “Results” section at <http://wireless.fcc.gov/auctions/87/>.

<sup>76</sup> Silke Application Petition at 5.

<sup>77</sup> *Id.* at 6.

harm.<sup>78</sup> The Havens Parties fail to specifically demonstrate how the policy allowing Silke and Two Way to adjust the level of their claimed bidding credits downward to conform with the facts that existed as of the short-form application deadline – which was well before the start of bidding in Auction 87 – affected the three Havens Parties that participated in Auction 87. Accordingly, we find no basis in the record to conclude that our policy of allowing certain amendments to short-form applications prevented any parties, including the Havens Parties, from participating in Auction 87 on an equal basis.

27. The Havens Parties cite *Alvin Lou Media, Inc. v. FCC* for the proposition that they need not have participated in Auction 87 or bid against Two Way or Silke to have standing.<sup>79</sup> We find that decision, however, to be inapplicable to the instant case. *Alvin Lou Media* arose in the context of licensing broadcast stations in which the petitioner, Alvin Lou Media, sought to challenge the underlying decision that led to the determination of mutual exclusivity.<sup>80</sup> In the context of licensing AM stations, the Commission staff undertakes a limited pre-auction review of applicants' technical data to the limited extent necessary to determine whether applications are mutually exclusive and entitled to geographic preferences under Section 307(b) of the Act.<sup>81</sup> Because the Commission is required by statute to resolve mutually exclusive applications by competitive bidding,<sup>82</sup> Alvin Lou Media's claim of error in the staff's review of technical data leading to the mutual exclusivity determination directly related to whether Alvin Lou Media should have to participate in the competitive bidding.<sup>83</sup> Given that Alvin Lou Media's claim related to a pre-auction process that determined if an auction was necessary, the court found Alvin Lou Media had standing to challenge the results even though it did not participate in the auction.<sup>84</sup> Thus, because Alvin Lou Media's claim was not based on bidding in the auction, standing did not rest on Alvin Lou Media's participation in the auction. In contrast, the Havens Parties' claims relate to the Commission policy that permitted Silke and Two Way to participate in an auction when, in fact, no Havens Party competed with either of these parties in the auction. Unlike Alvin Lou Media, which the court found to be at a "substantial competitive disadvantage" that precluded it from participation in the auction,<sup>85</sup> the Havens Parties suffered no such injury, having placed no bid on the same licenses on which Silke and

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<sup>78</sup> Petition for Reconsideration at 10. The Havens Parties also make broad, unsupported declarations that the policy causes "direct adverse economic affects upon participants in auctions subject to the [policy]," as well as "serious damage to auction and FCC integrity," and claim that "a flawed auction process *ipso facto* injures the participants in the auction." *Id.* at 5, 10. Similarly, the Havens Parties allege that they competed with Silke since they were qualified to bid on a common set of licenses and, therefore, were "competitors in a direct sense" with respect to "raising funds to bid on and pay for said common licenses, auction strategy on said licenses, bidding on all or some of said licenses, adjusting bidding strategy and bidding depending on bids by the other on any of said licenses..."). Silke Application Petition at 6.

<sup>79</sup> *Id.* at 7, 11, citing *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1 (D.C. Cir. 2009) (*Alvin Lou Media*).

<sup>80</sup> *Alvin Lou Media*, 571 F.3d at 3.

<sup>81</sup> 47 U.S.C. § 307(b). See *Alvin Lou Media*, 571 F.3d at 3.

<sup>82</sup> 47 U.S.C. § 309(j)(1).

<sup>83</sup> The petitioner in *Alvin Lou Media* refused to participate in the broadcast auction because it claimed that, if the Commission had dismissed the application as Alvin Lou Media had sought, there would have been no mutual exclusivity and thus no need for competitive bidding. *Alvin Lou Media*, 571 F.3d at 7.

<sup>84</sup> *Id.*, 571 F.3d at 6.

<sup>85</sup> The court found standing for a "disappointed participant in an auction process challenging rules as placing it at a competitive disadvantage." *Alvin Lou Media*, citing *DIRECTV*, 110 F.3d at 829-30.

Two Way bid and having faced no disadvantage or obstacle in participating in the bidding on those licenses had they wished to do so.<sup>86</sup>

28. The Havens Parties further assert their standing based on a claim that they now compete, or intend to compete, with Two Way and Silke (“and also virtually all other bidders . . . in Auction 87”) in the Commercial Mobile Radio Service (CMRS) market generally.<sup>87</sup> However, as previously explained in Commission precedent involving three of the Havens Parties, broad allegations of potential competition in the marketplace are insufficient to establish standing.<sup>88</sup> Instead, as noted above, to obtain standing, a petitioner must allege facts sufficient to demonstrate a direct injury; claims amounting to a “remote” or “speculative” injury are insufficient to confer standing. Increased competition in the general CMRS marketplace does not create the type of injury that confers standing.<sup>89</sup> Accordingly, we find that the Havens Parties lack standing to challenge the results of Auction 87.

#### **B. Havens Parties’ Claims Fail on the Merits**

29. As alternative and independent bases for rejecting the Havens Parties’ petitions to deny the license applications, we deny on the merits what we discern to be the gravamen of the Havens Parties’ principal complaint here. This is not the first time that Havens, along with some or all of the other Havens Parties, has challenged the Commission’s policy of allowing an auction applicant to reduce its bidding credit request prior to the auction. In March 2007, the Bureau’s Mobility Division addressed a challenge by Havens and three entities under his control to a license application for new Automated Maritime Telecommunications System licenses won in Auction 61.<sup>90</sup> Among other things, Havens

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<sup>86</sup> The Havens Parties also claim that they did not need to bid directly against Silke or Two Way to have standing, merely that they qualified to bid on the same licenses because it is possible some other bidders bid on licenses common to both the Havens Parties and Silke and Two Way. Silke Application Petition at 5-6. Such speculation cannot confer standing, as it is impossible to guess bidders’ motives and probable actions in the event that Silke and Two Way had not been able to participate.

<sup>87</sup> Petition for Reconsideration at 9. The Havens Parties specifically contend that Silke and Two Way are attempting to obtain CMRS licenses with which they “may directly compete with [the Havens Parties] in the areas of the nation those licenses authorize service.” *Id.*

<sup>88</sup> See *Paging Systems, Inc. and American Telecasting of Oklahoma, Inc., Memorandum Opinion and Order*, 22 FCC Rcd 1294 (WTB 2007) (*Paging Systems Bureau Order*), recon. dismissed, *Order on Reconsideration*, 23 FCC Rcd 7458 (2008), *app. for review dismissed w/o prejudice*, Letter from John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau, to Warren C. Havens, *Letter*, 24 FCC Rcd 13776 (2009). In *Paging Systems Bureau Order*, the Commission rejected the contention of three of the Havens Parties, Intelligent Transportation & Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Warren Havens, that “because ‘they are competitors with [high bidder] in several markets and within various radio services,’ they have standing to file the instant PTD.” *Paging Systems Bureau Order*, 22 FCC Rcd at 1297 ¶ 7.

<sup>89</sup> The Commission has consistently held that claims predicated on the addition of new competitors in the marketplace amount to a “remote” or “speculative” injury and are insufficient to confer standing. See, e.g., *Lawrence N. Brandt*, 3 FCC Rcd 4082 (1988); *Improving Public Safety Communications in the 800 MHz Band, Order*, WT Docket 02-55, 26 FCC Rcd 5004 (PSHSB 2011).

<sup>90</sup> See *Maritime Communications/Land Mobile LLC, Order on Reconsideration*, 22 FCC Rcd 4780, 4785-86 ¶ 10 (WTB 2007) (“*MC/LM Recon. Order*”), *app. for review pending* (“A[] [short-form] amendment that revises an applicant’s designated entity showing by adding revenues . . . [thus lowering the applicant’s designated entity legibility] . . . is not among the amendments listed as major in Section 1.929, and therefore is properly characterized as a minor amendment. Nothing in Section 1.2105 alters this conclusion, as that rule, like Section 1.929, includes changes in ownership as major amendments, but no such change of ownership [] has been found to occur here, notwithstanding the Petitioners’ arguments”). See *Maritime Communications/Land Mobile, LLC, EB Dkt. N. 11-71, Order To Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing*, 26 FCC Rcd 6520 (2011).

challenged the determination by the Commission staff that an auction applicant was entitled only to a 25 percent bidding credit, rather than the 35 percent bidding credit that it originally sought.<sup>91</sup> In that case, the Mobility Division found that, “[i]n the absence of a change of ownership, an amendment reducing an applicant’s bidding credit eligibility is minor.”<sup>92</sup> In June 2007, the Bureau’s Auctions and Spectrum Access Division (Auctions Division) also addressed the issue, again at the behest of a request by Havens.<sup>93</sup> The Auctions Division explained that the rationale behind the policy of allowing auction applicants to claim a lower bidding credit where the facts that existed as of the short-form deadline did not support a claim for the higher level of credit was intended to “ensure that applicants do not obtain small business bidding credits when they no longer qualified, or are unable to demonstrate eligibility[] for such benefits.”<sup>94</sup> In that case (as with Two Way and Silke), the applicant did not undertake any change in size after the short-form application deadline. Rather, the staff’s review of the application indicated that certain additional information should have been included in the application and that the additional facts were not consistent with the claim for a higher level of credit.

30. Despite these previous rulings, the Havens Parties once again question the policy governing such minor amendments, and, once again, misunderstand the governing rule. Section 1.2105(b)(2) of the Commission’s rules states that “[m]ajor amendments cannot be made to a short form application after the initial filing deadline... Major amendments include... changes in an applicant’s size which would affect eligibility for designated entity status.”<sup>95</sup> When the Commission implemented section 1.2105, it described, as an example of what would be an impermissible major amendment, a scenario in which a company that qualified as a small business merges with another company during the auction and,

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<sup>91</sup> *MC/LM Recon. Order*, 22 FCC Rcd at 4785-86 ¶¶ 10-11.

<sup>92</sup> *MC/LM Recon. Order*, 22 FCC Rcd at 4785-86 ¶ 10. The staff also noted that the United States Court of Appeals for the District of Columbia Circuit has upheld the Commission’s interpretation of section 1.2105, under which certain changes in size that result in a reduction or loss of eligibility for a bidding credit are considered “minor amendments” that do not disqualify an applicant from participation in an auction. *Id.* at 4785-86 ¶¶ 10-11, citing *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 162 (D.C. Cir. 2003), affirming *Liberty Productions, Memorandum Opinion and Order*, 16 FCC Rcd 12061, 12079 ¶ 39 (2001).

<sup>93</sup> See Letter from Margaret W. Wiener, Chief, Auctions and Spectrum Analysis Access Division, to Warren C. Havens, AMTS Consortium LLC, *Letter*, 22 FCC Rcd 10201 (WTB/ASAD 2007) (*Havens ASAD 2007 Letter*). Noting the *MC/LM Recon. Order*, the Auctions Division stated that, consistent with the purposes underlying section 1.2105(b), applicants may report that they are not entitled to a claimed level of bidding credit eligibility and may request a lower bidding credit, with the result that such changes are treated as minor amendments. The Bureau noted that such amendments previously have been submitted during the short-form application resubmission period, see, e.g., “Auction of Advanced Wireless Services Licenses; 168 Bidders Qualified to Participate in Auction No. 66; Information Disclosure Procedures Announced,” *Public Notice*, 21 FCC Rcd 8585, 8586 n.4 (WTB 2006) (noting that certain applicants were no longer seeking or had not demonstrated eligibility for certain levels of bidding credit); see also, e.g., “Auction of Broadband PCS Spectrum Licenses; 23 Bidders Qualified to Participate in Auction No. 71; Limited Information Disclosure Procedures to be Used,” *Public Notice*, 22 FCC Rcd 8347, 8348 n.6 (WTB 2007) (noting that applicant had amended its short-form application to include updated financial information, which made it eligible for a 15 percent credit, rather than the 35 percent credit it had originally claimed). See *Havens ASAD 2007 Letter*, 22 FCC Rcd at 10202 n.5. Allowing such changes “ensure[s] that applicants do not obtain small business bidding credits when they no longer qualified, or are unable to demonstrate eligibility[] for such benefits.” See *id.*, 22 FCC Rcd at 10202.

<sup>94</sup> See, e.g., *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 162 (D.C. Cir. 2003), affirming *Liberty Productions, Memorandum Opinion and Order*, 16 FCC Rcd 12061, 12079 ¶ 39 (2001).

<sup>95</sup> See 47 C.F.R. §1.2105(b)(2).

based on the change in the applicant's size, no longer qualifies for a bidding credit.<sup>96</sup> Thus, the rule is concerned primarily with the applicant's size and not with its request for a bidding credit *per se*.<sup>97</sup> An applicant can lose eligibility for a bidding credit in ways that do not involve the size of the applicant, and thus are only a minor amendment.<sup>98</sup> For example, an applicant – though it remains the same size – may realize belatedly that it was required to report in its short-form application information about existing, affiliated companies that could change its bidding credit eligibility.

31. Such is the case here. Both Silke and Two Way reported affiliates in their amended short-form applications that they omitted in their initial filings.<sup>99</sup> In each case, the applicant filed a curative amendment disclosing the existence of affiliates that had existed at the time of the initial short-form application deadline but that the applicant had failed to disclose in its initial filing. The record does not indicate that either applicant acquired any affiliate after the initial March 16, 2010 short-form application deadline or otherwise engaged in any impermissible change in size of the applicant after that date.<sup>100</sup> For example, in its amendment, Silke requested permission to adjust its bidding credit claim from 35 percent to 25 percent on account of its misunderstanding of the definition of “affiliate” contained in the Commission's competitive bidding rules and the related gross revenue attribution requirement.<sup>101</sup> Having understood the requirement to list additional entities as affiliates during the resubmission period for short-form applications, both Silke and Two Way understood that the additional gross revenues attributable to those entities required them to adjust their respective bidding credit claims.<sup>102</sup> Given all of these facts, the amendments made by both Silke and Two Way were properly considered “minor” changes, consistent with the Bureau's long-standing practice in similar cases.

32. We also reject the Havens Parties' suggestion that the Silke amendment evidenced lack of candor or an otherwise actionable false statement reflecting on Silke's qualification to hold a Commission license.<sup>103</sup> We find no indication in the record to suggest either Silke or Two Way intentionally withheld information in their initial short-form applications, or otherwise knowingly falsified their certifications. Beyond that, the Havens Parties appear to suggest that short-form

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<sup>96</sup> See, e.g., Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use 4660 – 4685 MHz, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 414 (1997) (*Part 1 Third Report and Order*).

<sup>97</sup> See *Skybridge Spectrum Foundation Opposition of the FCC to Petitioners' Motion for a Stay at 14*.

<sup>98</sup> *Id.*

<sup>99</sup> See Silke Application, Two Way Application.

<sup>100</sup> Silke claims that it failed to provide the information and revenue derived from its existing affiliates. See Silke Amendment. Silke, which indicated that it filed its initial short form application pro se, claims that it “did not understand what constituted an affiliate and the necessity to include that information at the onset.” *Id.* So, although Silke reported new information pertinent to its eligibility, its size remained the same. Similarly, Two Way amended its application and disclaimed any bidding credit due to increased “Disclosable Interest Holders gross revenue.” See Two Way Amendment. Thus, while the available information about Two Way's affiliates changed, its size remained the same.

<sup>101</sup> See Silke Amendment.

<sup>102</sup> Both Silke and Two Way requested the lower bidding credit well before bidding in Auction 87 began. Moreover, our public notices provided notice to all bidders of such changes prior to the start of bidding. See *Qualified Bidding Public Notice*, 25 FCC Rcd at 5407 n.2. Of course, the importance of such notice is significantly diminished in Auction 87, which was conducted under anonymous bidding procedures, which are designed to keep each bidder from knowing the identity of any bidder that it was bidding against.

<sup>103</sup> See Silke Application Petition at 10.

applications should be judged using a “letter-perfect” standard, a position that the Commission specifically rejected when it adopted the rule governing short-form applications and the process in which those applications would be reviewed.<sup>104</sup> Specifically, the Commission chose to allow applicants to make minor modifications to their short-form applications, thereby creating the auction process described above wherein the staff informs applicants of deficiencies in their short-form applications and encourages amendments when necessary to ensure the applications fully comply with the requirements set forth in the Commission’s rules.<sup>105</sup> We will not infer improper motive from errors, inconsistencies or omissions accompanied by speculation that lacks factual support.<sup>106</sup> Therefore, even if we were to find that the Havens Parties had standing to challenge the application of our policy concerning minor amendments and were to reach the merits of their claims, we would nevertheless deny their claim that Silke’s or Two Way’s actions ought to have been prohibited.

### C. Admonishment for Misuse of Process

33. The Commission recently imposed sanctions against Warren Havens for submitting repetitious and frivolous filings in an unrelated proceeding.<sup>107</sup> The Commission took this unusual step because it recognized that “[r]esponding to each [filing] takes limited Commission resources away from other non-frivolous matters...[and thus] undermines the public interest.”<sup>108</sup> The Commission specifically has warned Havens that, although the restrictions at issue concern only the specific license application proceedings involved in that case, the Commission would not hesitate to take action in other proceedings when there are additional abusive or frivolous pleadings.<sup>109</sup>

34. The Commission’s actions in that proceeding are relevant here to the extent that Havens, and the other Havens Parties, may be using the instant proceeding in Auction 87 to pursue issues that they have raised, and continue to pursue, in other unrelated proceedings involving different parties.<sup>110</sup> Specifically, the Havens Parties argue in the instant proceeding that the long form application filed by an Auction 61 winning bidder is “unlawful and must be reversed.”<sup>111</sup> Such arguments are beyond the scope of Auction 87. Moreover, Havens now appears to be making many of the same overly broad arguments from his challenge in Auction 61, without regard to the substantive differences particular to Silke or Two Way. Such action could be characterized as a misuse of process and takes away from limited Commission resources. Therefore, we take this opportunity to warn Havens and the entities he controls

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<sup>104</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 414 ¶ 66.

<sup>105</sup> The Commission adopted a liberal standard for short-form applications in order to increase the efficiency of the auction process. *See* paras. 2-4 *supra*.

<sup>106</sup> *See* Garrett, Andrews, & Letizia, Inc., *Decision*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981), *mod. on other grounds*, *Memorandum Opinion and Order*, 88 FCC 2d 620 (1981).

<sup>107</sup> Warren C. Havens, Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in Texas, and Applications to Provide Automated Maritime Telecommunications System Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado, *Memorandum Opinion and Order*, FCC 12-26 (2012) (*Havens Sanctions Order*).

<sup>108</sup> Warren C. Havens, Applications to Provide Automated Maritime Telecommunications System Stations at Various Locations in Texas, and Applications to Provide Automated Maritime Telecommunications System Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado, *Third Order on Reconsideration*, 26 FCC Rcd 10888, 10892 ¶ 12 (2011) (*Havens Third Order on Reconsideration*); *Havens Sanctions Order* at ¶¶ 14-21.

<sup>109</sup> *Havens Third Order on Reconsideration*, 26 FCC Rcd at 10893 ¶ 14.

<sup>110</sup> *See* n.28 *supra*.

<sup>111</sup> *See* Petition for Reconsideration at 4.

that such action may rise to the level described in the *Havens Sanctions* proceeding imposing sanctions against Havens.

### III. CONCLUSION

35. We dismiss the petition for reconsideration of the Auction 87 public notices as procedurally improper, either because the public notices were interlocutory in nature and therefore not subject to reconsideration or the challenge of which was untimely. We also find, as to their petitions to deny the Two Way and Silke applications, that the Havens Parties fail to meet the fundamental pleading requirements of section 1.939 of the Commission's rules, and have failed to establish standing to pursue their arguments in any of the petitions. We therefore dismiss the Havens Parties' petitions to deny.

36. Furthermore, as alternative and independent bases for rejecting the Havens Parties' petitions to deny, even if we were to reach the merits of the Havens Parties' claims, we would reject the primary substantive argument that an auction applicant cannot seek a lower bidder credit request after filing its initial short-form application. The Commission's rules and precedent allow applicants to amend their short-form applications to request a lower bidding credit. Therefore, even if their petitions were not dismissed on procedural grounds, we would deny the Havens Parties' petition for reconsideration of Auction 87 public notices and their petitions to deny the license applications of Silke and Two Way.

### IV. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d), and sections 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration of Various Auction 87 Public Notices, filed by Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, V2G LLC, Telesaurus Holdings GB LLC, Verde Systems LLC, Environmental LLC, and Warren Havens on September 27, 2010, and amended on October 19, 2010, IS DISMISSED.

38. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d), and sections 1.939 and 1.2108 of the Commission's Rules, 47 C.F.R. §§ 1.939, 1.2108, the Petitions to Deny Auction 87 Application File Nos. 0004355886 (Silke Communications, Inc.) and 0004359102 (Two Way Communications) filed by Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, V2G LLC, Telesaurus Holdings GB LLC, Verde Systems LLC, Environmental LLC, and Warren Havens on September 27, 2010, and amended on October 4, 2010, ARE DISMISSED. On alternative and independent bases as set forth herein, the Petitions to Deny ARE DENIED.

39. This action is taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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Wireless Telecommunications Bureau

Margaret Wiener  
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